BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANIE MEYERS, Claimant, v. FEARLESS FARRIS SERVICE STATIONS, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2003-521168** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed February 9, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on August 24, 2006. Claimant was present and represented by Patrick D. Brown of Twin Falls. Neil D. McFeeley of Boise represented Employer/Surety. Oral and documentary evidence was presented. The record remained open for the taking of two post-hearing depositions. The parties submitted post-hearing briefs and this matter came under advisement on December 19, 2006.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether Claimant suffered a personal injury arising out of and in the course of her employment;

2. Whether Claimant's alleged injury was the result of an accident arising out of and in the course of her employment;

3. Whether and to what extent Claimant is entitled to the following benefits:
   a. medical;
   b. permanent partial impairment (PPI);
   c. permanent partial disability (PPD);

4. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate;

5. Whether Defendants are entitled to reimbursement of benefits;

6. Whether Claimant has refused suitable work;

7. The determination of Claimant's average weekly wage; and

8. Whether Claimant has persisted in unreasonable or unsanitary practices such that benefits should be reduced or suspended.[1]

CONTENTIONS OF THE PARTIES

Claimant contends she injured her right knee when she was kneeling on some cases of pop/beer to reach up to get a towel off a shelf in the storage room at Employer's convenience store. She subsequently underwent arthroscopic surgery that eventually resulted in complex regional pain syndrome (CRPS) that continues to cause her pain and diminished range of motion in her right knee, as well as back pain from compensating for her altered gait. Claimant seeks future medical care, PPI, and PPD in excess of PPI.

Defendants question whether Claimant actually hurt herself at work based on differing histories she has given her health care providers regarding whether she merely knelt on the boxes or slipped off them and bumped her right knee. Further, they contend that, should liability be found, Claimant has no PPD in excess of her disputed PPI in that she has neither sought nor

[1] Defendants withdrew this issue in their post-hearing brief, and failed to discuss issues numbered 5 and 6, and they are deemed abandoned.

attempted work and when a reasonable assessment of her physical restrictions is taken, she is able to perform the types of work she could perform pre-injury and at a similar wage. Finally, any PPI or PPD benefits awarded should be apportioned to a myriad of pre-existing conditions.

Claimant counters by pointing out that none of her pre-existing conditions, while sometimes symptomatic, prevented her from working until the time of her accident. Further, she consistently told her caregivers that she hurt her knee by putting her weight on it while kneeling and she does not know how the term "slipped" found its way into certain medical records. Finally, Claimant attempted and searched for work without success. Her inability to sit and stand for any length of time has seriously limited her in obtaining employment and she has lost a significant amount of her pre-injury labor market.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and vocational consultant Nancy Collins, PhD., taken at the hearing.

2. Claimant's Exhibits A-Z admitted at the hearing.

3. Defendants' Exhibits 7, 13, 20 and 21 admitted at the hearing.

4. The post-hearing deposition of Kim Cheri Wiggins, M.D., taken by Claimant on August 29, 2006, and that of Robert H. Friedman, M.D., with 1 exhibit, taken by Defendants on October 4, 2006.

All objections made during the taking of the above depositions are overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 58 years of age and resided in Twin Falls at the time of the hearing. On September 15, 2003, while working as a cashier/clerk at Employer's convenience store, she injured her right knee in an accident she described as follows at hearing:

> A. Yes. I went to get a clean towel to wipe off the counters, and they were up on a rack in the storeroom, which is not a very big storeroom. The towels were up there. There was not enough room to put a ladder because of inventory they had sitting on the floor. So I thought, well, I'd just climb up on these cases of beer and pop that were sitting in front of this, and reach up to get a towel.
>
> And when I did - - and I put all my - - I shifted my weight to reach for the towel, I felt an excruciating pair - - pain, like something tearing. And by the time I got down off those, my knee was red and hurting. But I was the only one there, so I continued to do my job.

Hearing Transcript, p. 54.

2. Claimant first sought medical treatment the following day at Physician's Immediate Care Center. On the intake sheet Claimant wrote, "Kneeling on box to reach a towel and started having pain." Claimant's Exhibit K, p. 2. Scott Rudeen, M.D., diagnosed an infection in Claimant's right knee and took her off work for two to three days. Dr. Rudeen later clarified that the "infection" was secondary to trauma.

3. Claimant next saw Mary Beth Curtis, M.D., on September 19, 2003. She informed Dr. Curtis that, "She was climbing up onto some boxes to reach for a clean towel. She apparently leaned all her weight onto her right knee to grab the towels and suddenly felt a sharp shooting down from her knee down to her mid lower leg." Claimant's Exhibit L, p. 4. Dr. Curtis diagnosed a right knee contusion, gave Claimant a knee brace, Celebrex, and work restrictions. A right knee x-ray was normal except for some mild osteoarthritis. On September 25, 2003, Claimant returned to the clinic and met with Doug Stagg, M.D. She gave Dr. Stagg the same history as given to Dr. Curtis. He was concerned about a meniscal tear and on October 1st, he

took Claimant completely off work due to increasing pain. A right knee MRI accomplished on October 30th revealed findings "consistent with a strain of the anterior cruciate ligament without evidence of disruption. No other evidence of internal derangement is noted." *Id*., p. 33. On November 10, 2003, Dr. Stagg referred Claimant to orthopedic surgeon Blake Johnson, M.D.

4. Claimant first saw Dr. Johnson on November 18, 2003. Dr. Johnson recorded that Claimant was standing in front of a case of beer and "slipped" sustaining a right knee injury. Claimant testified at hearing that she does not know why Dr. Johnson referred to a "slip." Upon examination, Dr. Johnson diagnosed patellofemoral pain of the right knee that may represent chondral damage. He recommended an aggressive quad strengthening program and gave her an intraarticular Cortisone injection. Because the effects of the injection only lasted a few days and, "Since that time she is as bad as ever and feels that this is currently unlivable," Dr. Johnson performed an arthroscopic debridement and right lateral release on Claimant's right knee on March 8, 2004. Claimant's Exhibit M, pp. 3-A and 5-6.

5. Claimant's post-operative course was significant for increased pain and no improvement due to scarring. A bone scan was negative and a repeat MRI was essentially normal except for minimal effusion. Physical therapy did not help. Dr. Johnson began to suspect complex regional pain syndrome (CRPS), but Claimant did not have the "classical symptoms" associated therewith. Dr. Johnson referred Claimant to Clinton L. Dille, M.D., of the Southern Idaho Pain Institute. Dr. Dille performed a sympathetic nerve block and when Claimant obtained no relief, he opined that a diagnosis of CRPS was doubtful. However, when later informed by Dr. Johnson that Claimant did, in fact, obtain about 30 minutes worth of relief from the block, Dr. Dille concluded that Claimant was suffering from industrially related CRPS. Dr. Johnson had nothing more to offer Claimant as a repeat arthroscopy was not appropriate in

the presence of CRPS and Surety authorized Dr. Dille to assume her care. After repeated nerve root blocks and an epidural injection failed to reduce Claimant's right knee pain, Dr. Dille recommended the LifeFit program at the Idaho Elks Hospital.

6. On July 13, 2005, Claimant saw orthopedic surgeon Stanley Waters, M.D., Ph.D., at Surety's request. Dr. Waters took the following history: "As you are aware, the patient described to me that she had climbed onto a case of beer while at work when she described that she slipped, sustaining an anterior blow to the flexed right knee. She felt immediate pain in the anterior aspect of the knee." Claimant's Exhibit S, p. 5. Dr. Waters opined that Claimant had " . . . appeared to have developed some exacerbation of underlying chondromalacia of the patella following her fall onto a flexed right knee." *Id*., p. 5-G. He noted that Claimant developed reflex sympathetic dystrophy (RSD) following surgery that is directly related to her work injury. Dr. Waters agreed with Dr. Johnson that Claimant was not a surgical candidate due to her underlying CRPS/RSD. He recommended a multi-disciplinary approach to treating Claimant's CRPS/RSD and recommended the LifeFit program.

7. Claimant attended the LifeFit program under the direction of Robert H. Friedman, M.D., from August 23, 2005, through September 16, 2005. Although Claimant testified that she did not benefit by the program, the records from LifeFit indicate that she "did excellent" in the program and was taught methods of dealing with and controlling her pain.

8. On October 18, 2005, Claimant saw K. Cheri Wiggins, M.D., a physiatrist, at her attorney's request for an IME. Dr. Wiggins took Claimant's history, reviewed pertinent medical records including the LifeFit notes, and examined Claimant. Claimant gave Dr. Wiggins this history: "She states she needed a clean towel to wipe counters with. She went into the stock room and climbed up onto some beer cases to reach a new towel. She reports that she kneeled on

the beer cans with her right knee and had immediate pain throughout the right knee." Claimant's Exhibit U, p. 1. Dr. Wiggins diagnosed a marked decrease in the range of motion in Claimant's right knee with underlying chondromalacia, CRPS that is in a "more dormant phase," and back pain due to a gait abnormality related to right knee pain. Dr. Wiggins opined that Claimant was at MMI and assigned a 34% whole person PPI rating. She later corrected that rating to 18%. Although originally seen for an IME, Claimant began treating with Dr. Wiggins.

DISCUSSION AND FURTHER FINDINGS

Accident/injury:

Defendants argue that there is no medical evidence supporting the contention that Claimant suffered any defined injury in her alleged accident and that kneeling on a case of beer/soda pop does not constitute an accident. An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(17)(b). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736

(1995). "Probable" is defined as having "more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903,906 (1974).

9. Dr. Wiggins testified as follows regarding medical causation:

> Q. (By Mr. McFeeley): Let me ask you your understanding of how Ms. Meyers' original industrial injury occurred. How did Ms. Meyers' original industrial injury occur?
>
> A. From what I understand, she was working at the service station. And she was climbing up onto some beer cases to get a towel to wipe the counters with, and kneeled on her knee, and said that she – and had immediate pain throughout the knee. And that was how things started.
>
> Q. And what was it that happened?
>
> A. I have no idea.
>
> Q. Okay. What did the pain arise from?
>
> A. I don't know. I don't understand why it happened. It's an unusual situation, but I don't know how it happened.

Dr. Wiggins' Deposition, pp. 18-19.

10. Dr. Friedman was also having difficulty grasping the mechanics of Claimant's injury:

> Q. (By Mr. McFeeley): The question I have is, how is that situation [kneeling on the cases of pop/beer] - - how could it cause the problem that Ms. Meyers experienced?
>
> MR. BROWN: Same objection.
>
> THE WITNESS: The story is that she's climbing up - - she has this injury to her knee. She, in fact, did tell me that she felt something tear. She had some tissue injury. The question is, how can a pain syndrome like this occur?
>
> Well, part of that difficulty in answering that question is as a medical community we have theories on how Complex Regional Pain Syndromes begin and spread, but we have no clear idea of what causes them in the causation legal theory, and it is a diffuse pain syndrome. So my answer to you is, I don't know the answer to that question.

Dr. Friedman Deposition, p. 26.

Dr. Friedman was also unable to say whether Claimant's surgery was related to her accident.

11. While there is not an overwhelming amount of medical evidence relating Claimant's need for surgery and resultant CRPS to her accident, there is enough to base a finding of a connection. Dr Friedman issued an impairment rating and did not indicate that the rating (other than apportioning a certain amount to Claimant's pre-existing chondromalacia) was for anything other than the right knee injury she "somehow" received as the direct result of her accident. Dr. Wiggins, while not able to exactly explain the mechanics of Claimant's injury, nonetheless testified as follows regarding the relationship of her CRPS to her injury:

> What I would say to you is based on the medical information I had to review and the history of pain from the patient, the Complex Regional Pain Syndrome that she had was on a more-probable-than-not basis related to her injury - - I cannot tell you what was injured to cause it - - and that the treatment that she received was relative to manage the pain that's associated with it.

Id., p. 29.

12. Dr. Scott Rudeen, who Claimant saw soon after her injury, wrote on August 16, 2006: "This is to clarify that Mrs. Meyers' knee infection (right tibial tubercle) appeared to be as a result of trauma to that knee sustained as a result of her knee being traumatized by kneeling onto beer cans while at her place of employment on September 15, 2003." Claimant's Exhibit Z. Dr. Johnson, the orthopedic surgeon who performed the surgery on Claimant's right knee, diagnosed "Patellofemoral pain, right knee s/p injury" on November 18, 2003. Claimant's Exhibit M, p. 1. He further noted on January 7, 2003, in a letter to Surety, "This history as well as her physical findings are very classic for patellofemoral symptoms; which I believe are related to her work related injury of 15 September 2003." *Id*., p. 3-D. Dr. Waters, the orthopedic surgeon Claimant saw at Surety's request on or about July 13, 2005, "clearly directly" related her right knee injury, subsequent surgery, and the

development of CRPS to her accident, even though he erroneously recorded a history of a fall.[2] Had Claimant not experienced immediate pain as she knelt or had she had symptomatic right knee problems in the days immediately prior to her accident, the argument that she did not suffer any defined injury in her accident would be more persuasive. However, nothing in the record supports that proposition. Claimant experienced an untoward event when she knelt on her right knee in performance of duties for Employer. Thus, the Referee finds that Claimant suffered an accident causing an injury on September 15, 2003.

Medical benefits:

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

13. Dr. Wiggins has become Claimant's treating physician. In a June 6, 2006, letter to Claimant's counsel, Dr. Wiggins indicated that Claimant will require medical care for the rest of her life including doctor visits and certain medications. To the extent that such further treatment can be related to Claimant's right knee, CRPS, and/or lower back pain due to her abnormal compensatory gait, Defendants are liable for that treatment.

PPI:

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered

[2] The medical records generated more closely in time to Claimant's accident do not mention slipping or falling. Claimant's testimony that she did not tell any medical providers that she slipped is credible.

stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

14. Two PPI ratings have been assigned in this matter. Dr. Friedman assigned a 15% rating and apportioned 5% to Claimant's pre-existing chondromalacia. As previously indicated, Dr. Wiggins assigned an 18% rating with no apportionment. Both physicians testified regarding their respective views of the proper utilization of the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition (*Guides*). The Referee finds that both physicians were credible in defense of their respective ratings and that averaging the two ratings is appropriate in this case. Therefore, the Referee finds that Claimant has incurred whole person PPI of 16½ %. The Referee is not inclined to apportion for pre-existing chondromalacia as there is no evidence that such condition, if in fact it was pre-existing, in any way hindered Claimant pre-accident or was in any way symptomatic. Further, as candidly testified to by Dr. Friedman, the *Guides* provide no direction regarding how to apportion, only that apportionment is appropriate when "indicated".

PPD:

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent

impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

15. Claimant was 58 years of age at the time of the hearing. Her work experience consists primarily of waitressing/bartending/cashier/clerking-type jobs. She could not remember

if she completed the 10th or 11th grade of high school, but she has not obtained a GED and has had no other post-high school education. In late 1980 and early 1990 she worked in accounts payable, data entry, and as a payroll clerk. For a few months in 2002, she worked in customer services at Dell Computer in Twin Falls but left because of the stress of the job. At the time of her injury, she was working at Employer's convenience store as a cashier/clerk. She also stocked and cleaned as needed. She received no benefits.

16. Claimant retained Nancy Collins, Ph.D., C.R.C., to assist her with vocational issues. Dr. Collins' qualifications are well known to the Commission and will not be repeated here. Dr. Collins prepared two written reports and testified in person at the hearing. In her first report dated November 9, 2005, Dr. Collins noted the following restrictions:

September 25, 2005, FCE: Can work seven hours a day with four hours sitting 30 minutes at a time, three hours standing of 30 minute duration, and walk four hours for occasional moderate short distances. Light strength category. No squatting, crouching, or crawling. Occasional stair climbing.

September 14, 2005, Dr. Friedman: light to medium work level and no kneeling.

September 19, 2005, Dr. Friedman: permanent restrictions are no kneeling or squatting and limited stair climbing. Can work full time.

Dr. Collins concluded in her first report that Claimant has lost access to 60% of her pre-injury labor market and a loss of earning capacity of 15% for a 37.5% whole person permanent partial disability inclusive of permanent partial impairment.

17. Dr. Collins authored a second report on June 19, 2006, after having reviewed Dr. Wiggins' IME report of June 2006. Dr. Wiggins' restrictions are:

Claimant can sit for one hour at a time.

Claimant will require breaks at least every hour.

Claimant should be able to stand and/or walk for less than 15 minutes at a stretch.

Claimant should be able to lift approximately 10 pounds from the waist.

Claimant should be able to carry five pounds frequently and 10 pounds infrequently.

Claimant should not bend, stoop, twist, crawl, kneel or climb due to right knee problems.

Based on Dr. Wiggins' restrictions, Dr. Collins revised her first report and concluded:

> My opinion in November of 2005 was based on the restrictions given at the time. Her restrictions now are much more significant and essentially result in a greater reduction in labor market access. Ms. Meyers is nearly 60 years old. She has an unskilled work history, with very basic clerking skills, that are now over 10 years old. She walks with a cane and now has less than sedentary work restrictions.
>
> She can no longer perform most of the jobs I listed in my original report, because she cannot sit long enough to do the job. She might be able to work part-time as a receptionist or clerk with these limitations. I think she will have a very hard time finding an employer willing to hire her at her age, with her restrictions and lack of skill.

Claimant's Exhibit W, p. 9.

18. Based on Dr. Wiggins' restrictions, Dr. Collins opined that Claimant's loss of access is now 70% and her loss of earning capacity is now 65% for a disability including PPI of 72.5%. Defendants argue that Claimant is not entitled to <u>any</u> disability above impairment because Dr. Friedman opined that at 10 weeks post-LifeFit, Claimant will have improved 10% a week as she did in the program and, thus, will have no restrictions at that time. They further argue that Dr. Friedman's opinions and testimony should be given greater weight than those of Dr. Wiggins due to his greater experience and the multi-disciplinary approach to pain management present at LifeFit. The Referee disagrees to an extent. To agree with Dr. Friedman's 10% a week improvement theory, one would have to totally discount Dr. Wiggins' opinions regarding restrictions based on her physical examination of Claimant <u>after</u> the LifeFit program. The Referee is unwilling to go that far. However, when taking into account

Claimant's lack of a meaningful job search as well as her rather significant pre-existing conditions including heart problems, depression, stress, high blood pressure, emphysema, inability to walk a block without her legs hurting, and smoking a pack of cigarettes a day, there is no question that Claimant was at least somewhat limited in her employment options before her accident. She was never a high wage earner. She could possibly, at least physically, return to work for Dell Computers but she testified that she did not believe she was qualified for that job even though Dell apparently had no problems with her. The Referee noted at hearing that Claimant would not make a favorable impression to a prospective employer. Whether Claimant has developed a "disability mindset" is difficult to determine, but this Referee has seen workers more restricted than Claimant who have shown more motivation in returning to the work force than she has.

19. Dr. Wiggins observed that Claimant's CRPS is in a "dormant phase", yet she has given Claimant some fairly severe restrictions. The Referee is unable to determine the subjective accuracy of many of those restrictions. For example, does Claimant really need to use a cane to ambulate? If not, as Dr. Friedman contends, she would make somewhat of a better presentation to prospective employers. If so, as Dr. Wiggins contends, her presentation would be less favorable and put a prospective employer on notice that here may be some physical problems present before a job offer is made. While it is always difficult to assess disability above impairment, the Referee is persuaded that Claimant has incurred a certain level of disability here. When taking into consideration the statutory factors, especially Claimant's age, physical condition, education, transferable skills, and personal circumstances, the Referee finds that Claimant has incurred a 55% whole person disability inclusive of her 16½ % impairment

Apportionment:

Idaho Code § 76-406(1) provides:

> In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

20. Although Claimant has pre-existing conditions as previously discussed, the Referee is unable to find that all or some of those conditions increased or prolonged the duration of her disability. The restrictions imposed by Dr. Wiggins were for Claimant's right knee. Claimant was able to perform her work prior to her accident and injury. Apportionment is not appropriate in this case.

Average weekly wage:

21. Defendants argue that, giving Claimant the benefit of the doubt, her average weekly wage is $200.00 because she admitted she earned $6.25 an hour and worked no more than 32 hours a week. Further, on the Notice of Injury and Claim for Benefits form filled out by Claimant, she indicated that she only worked 5-8 hours a day, 5 days a week. Claimant argues that the correct average weekly wage is $352.52 as is "admitted" at page 5 of Defendants' Exhibit 21. However, the figure used on that form (a TTD calculation worksheet prepared by Surety) is $350.52. Claimant's Complaint alleges an average weekly wage of $250.00. Defendants' Answer alleges an average weekly wage of $156.25. The Referee finds Claimant's average weekly wage to be $250.00 ($6.25 and hour times 40 hours a week equals $250.00).

CONCLUSIONS OF LAW

1. Claimant suffered an accident causing an injury on September 15, 2003.

2. Claimant is entitled to future medical care for her right knee condition, CRPS, and/or low back pain so long as such treatment continues to be related to her accident.

3. Claimant has incurred whole person PPI of 16½ % without apportionment for pre-existing conditions.

4. Claimant has incurred whole person disability inclusive of impairment of 55%.

5. Apportionment pursuant to Idaho Code § 72-406 is not appropriate.

6. Claimant's average weekly wage at the time of her accident was $250.00.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this _7th_ day of __February____, 2007.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __9th ___ day of __February____, 2007, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

PATRICK D BROWN
PO BOX 207
TWIN FALLS ID 83303-0207

NEIL D MCFEELEY
PO BOX 1368
BOISE ID 83701-1368

__/s/_____

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JANIE MEYERS, Claimant, v. FEARLESS FARRIS SERVICE STATIONS, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2003-521168** **ORDER** Filed February 9, 2007

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant suffered an accident causing an injury on September 15, 2003.

2. Claimant is entitled to future medical care for her right knee condition, complex regional pain syndrome, and/or low back pain so long as such treatment continues to be related to her accident.

3. Claimant has incurred whole person permanent partial impairment of 16½% without apportionment for pre-existing conditions.

4. Claimant has incurred whole person disability inclusive of impairment of 55%.

5. Apportionment pursuant to Idaho Code § 72-406 is not appropriate.

6. Claimant's average weekly wage at the time of her accident was $250.00.

7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __9th ___ day of ___February_____, 2007.

INDUSTRIAL COMMISSION

__/s/_____
James F. Kile, Chairman

__/s/_____
R. D. Maynard, Commissioner

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __9th ___ day of __February___, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

PATRICK D BROWN
PO BOX 207
TWIN FALLS ID 83303-0207

NEIL D MCFEELEY
PO BOX 1368
BOISE ID 83701-1368

___/s/_____

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